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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 07 2005

EAC 03 170 50542

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a senior research scientist at Advanced Viral Research Corporation (AVRC), Yonkers, New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner describes her work:

> I believe that I can substantially benefit the United States prospectively, by significantly contributing to advanced scientific research in the areas of Virology and Immunology, areas of special interest and concern to the United States, ***in the present climate of bioterrorism, food safety and public health***. . . .
>
> I submit that I can substantially benefit the scientific effort of the United States prospectively, playing a significant role in the ongoing research on diseases such as **HIV, Hepatitis, SARS** and **Cancer**, by way of discovery of **advanced vaccines**, developing **new drugs** and **diagnostic assays**, at the cutting edge of technology in the United States. . . .
>
> I am closely associated with the research and development of "**Product R**" at Advanced Viral Research Corp, and with its **clinical trials in Argentina and Israel**.
>
> **"Product R"** is being studied for the promise shown in its ability to mitigate the toxic side effects of other drugs (**including those used to treat HIV infection and chemotherapeutic drugs employed in the treatment of cancers**); for its ability to stimulate the immune system to attack tumor cells (especially those cancer cells that have been damaged by chemotherapeutic agents), and for its ability to treat cachexia (wasting) in **patients with AIDS or cancer**. It is also currently being considered as a **treatment for SARS**.

(Emphasis in original.) In her initial statement, the petitioner states six times that she has been "closely associated" with the development of Product R, but she does not specify the nature of this association. The petitioner has also submitted a separate statement of "Responsibilities and Project Summary," indicating that the petitioner's general responsibilities include hiring, training and supervision, and maintenance of equipment. The petitioner is also responsible for tissue cultures and assays and quality control. The petitioner is involved in testing Product R, but there is no indication that she discovered or formulated the drug. There is also no indication that clinical trials have confirmed the efficacy of Product R for any of the purposes claimed. The petitioner submits printouts from AVRC's web site, http://www.adviral.com. The site refers to Product R as the company's "principal pharmaceutical product"; the printouts identify no other products conceived or made by AVRC. The record contains copies of what appear to be numerous press releases from AVRC, promoting Product R, but no evidence of third-party reaction to the drug.

Prior to her employment at AVRC, the petitioner performed veterinary virology for the Italian Ministry of Health, developing a test to identify cattle had been vaccinated against foot-and-mouth disease. The petitioner also studied hepatitis B and hepatitis C viruses at the [redacted] Research Institute of the New York Blood Center.

The petitioner submits copies of her published articles and abstracts from her conference presentations. These documents show that the petitioner has been an active and prolific researcher, but their very existence does not establish the impact of the petitioner's work. The record does not show the extent (if any) to which other researchers have cited the petitioner's published work, or otherwise relied on her findings.

The petitioner submits several letters, all from witnesses who have supervised or employed the petitioner. Dr. [redacted], director of the Department of Biotechnology and the National Reference Center for Vesicular Viruses in Brescia, Italy, supervised the petitioner's postdoctoral research. Dr. [redacted] states:

> [The petitioner] was responsible for the development of highly specific and sensitive Monoclonal Antibody-based Foot and Mouth Disease Virus (FMDV) diagnostic tests for the differential detection of vaccinated, infected and carrier animals (irrespective of serotype) by using recombinant non-structural proteins.
>
> These and similar assays have represented the biggest innovation for the FMD control during recent years. They have allowed to re-introduce [sic] the vaccination strategy for the control of FMD in order to reduce massive culling, as occurred during the epidemic of 2001 in UK. Being simple serological assays, at present they represent the unique tool enabling a large scale application (testing of all vaccinated animals), with further advantages over any other serological and virological tests consisting in safety (use of recombinant, non infectious antigens) and functionality for all seven serotypes.

Dr. [redacted], head of the Laboratory of Virology at the [redacted] Research Institute, states:

> I am aware about [the petitioner's] work, as she was trained by me in Advanced Viral Research in our Research Institute. . . .

> She developed and implemented a research program to investigate DNA-based immunization against viral diseases, including the mechanisms of DNA targeting and delivery. . . .
>
> I have since kept contact with [the petitioner's] work. I consider her research to be outstanding by any international standards. Her contribution to the science of Virology and Immunology, especially in Assay and Drug development borders at [sic] frontiers of technology.

Dr. [redacted], discusses his own professional credentials, describes the intended uses of Product R, and states that the petitioner "is one of those few brilliant researchers who have achieved considerable success in her field of research, and whom her peers accept as belonging to that small percentage of scientists considered outstanding in her field of research." Dr. [redacted] says little about the petitioner's individual role in the development of Product R.

Paul Fioriti, quality assurance manager at AVRC, offers further information about the petitioner's role at the company:

> [The petitioner[has been working in the Quality Control Laboratory here at the Advance Viral Research Corp [sic] since last October. Prior to this time, she worked in Research and Development for four years. . . .
>
> She single handedly operates, maintains and controls our Product Stability Program. . . . Since many of the Analytical Test Methods used in Quality Control were originally developed in research, [the petitioner] has served a critical role in the transfer of this technology. In fact, a large part of this company's intellectual property has originated and is attributable in no small part to her.

The director denied the petition, stating that the petitioner has not shown that she has made any particularly significant discoveries or advances in her field, or that it is otherwise in the national interest to ensure that the beneficiary, rather than another qualified worker, remains in the beneficiary's present position. The director added: "The choice of an important field that few others choose does not, necessarily, warrant a national interest waiver."

Counsel, on appeal, states: "We most humbly request that we may be given an opportunity to present Oral Arguments before the AAU [now the AAO] in Washington DC." The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

On appeal, counsel faults the director for citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Counsel asserts that *Brantigan* "relates to a matter of legal termination of a U.S. Citizen Petitioner's prior marriage. It bears no relationship to the current case of a National Interest Waiver." The director cited *Brantigan* not because the facts of that case closely parallel the present proceeding – they clearly do not – but because, in *Brantigan*, the Board of Immigration Appeals ruled that "[i]n visa petition proceedings the burden of proof to establish eligibility for the benefit sought rests with the petitioner." *Id.* at 493. Counsel protests that the cited passage is a sentence fragment, quoted out of context, because the complete sentence reads:

> In visa petition proceedings the burden of proof to establish eligibility for the benefit sought rests with the petitioner, and in the absence of proof of the legal termination of a U.S. citizen petitioner's prior marriage, reliance on the presumption of validity accorded by California law to his subsequent ceremonial marriage in that State to the beneficiary is not satisfactory evidence of the termination of his prior marriage and is insufficient by itself to sustain the petitioner's burden of proof of a valid marriage on which to accord beneficiary nonquota status.

The BIA did not state or imply that this standard applies only to immediate relative petitions filed on behalf of alien spouses. By counsel's strict reasoning, *Brantigan* does not even apply to marriages solemnized in, for instance, Oregon or Missouri, because the cited passage specifically refers to "California law" and "marriage in that State." We see no reason to conclude that the BIA intended for so narrow a construction of its precedential ruling. We also find the first clause of the sentence to be distinct and separable from the remainder of the sentence, such that the sentence begins with a general statement of principle about the burden of proof "[i]n visa petition proceedings" (rather than "in immediate relative immigrant visa petition proceedings"), and then goes on to apply that general principle to the specific case at hand (which happened to involve a marriage in California). Therefore, the director did not err in citing *Brantigan* strictly to indicate that the burden of proof is on the petitioner to establish eligibility.

Furthermore, *Brantigan* aside, the statute itself places the burden of proof squarely and solely on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361, states: "Whenever any person makes application for a visa . . . or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or . . . that he is entitled to the . . . immigrant . . . status claimed."

Counsel argues that the director's notice of decision contains insufficient details regarding the documentation submitted in support of the petition. Counsel states:

> We submit that if a detailed analysis and evaluation of the evidence submitted by the petitioner . . . in support of her petition, had been made by the Director . . . it would not have been necessary for the Director . . . to bring up the threshold issues and the three prong test criteria as the basis for making a determination on the petition which has a considerable bearing on the National interest.

> We submit that if the evidence submitted by the petitioner . . . had been carefully scrutinized, the Director . . . would have found the answers that he was seeking on the threshold issues and the three prong test criteria, in the submitted evidence itself.

It is not entirely clear what counsel argues here. Counsel appears to argue that a detailed reading of the petitioner's evidence makes the petitioner's eligibility so clearly evident that there is no need to consider the three-prong test set forth in *Matter of New York State Dept. of Transportation.*

Counsel then argues that, "while it is mandatory for an employer to follow the procedures in the matter of Labor Certification, it is somewhat of a grey area when it concerns self petitioning Aliens in the matter of Labor Certification. . . . There is no employer in such cases." The fact that the alien in the present matter is self-petitioning does not significantly distinguish the present proceeding from that in *Matter of New York State Dept. of Transportation.* In that decision, the AAO acknowledged:

> The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Matter of New York State Dept. of Transportation at 218, n.5. Furthermore, it is grossly inaccurate to say "[t]here is no employer" in the present proceeding. The alien petitioner works for Advanced Virus Research Corp., and the waiver request is rather emphatically predicated on the alien's work with AVRC's proprietary Project R. Counsel appears to imply that a labor certification would have been appropriate had AVRC filed the petition, but that the exact same employment situation now warrants a waiver because the alien filed the petition, instead of her employer. We reject this reasoning. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

Counsel states:

> We submit that one of the principles underlying the concept of a "National Interest Waiver," is that researchers in important areas of science and technology, that few others have chosen, should be encouraged to live and pursue their work in the United States. . . .
>
> We submit that such men and women of science are welcome in any country of their choosing, in view of their knowledge and skill in science and technology at the level of excellence.

There is no indication in the statute that scientific researchers are inherently considered to be beyond the reach of the job offer requirement. To the contrary, section 203(b)(2)(A) of the Act specifically states that the

job offer requirement normally applies to members of the professions holding advanced degrees (which necessarily includes scientists) and to aliens of exceptional ability in the sciences.

With regard to "the level of excellence" that the petitioner has attained, it is the petitioner's burden to show that she stands above her peers to such an extent that she merits a waiver, which is not a visa classification but rather a special, additional benefit over and above the underlying visa classification. General arguments about the importance of science, or of virology, do not establish that all scientists or all virologists qualify for the national interest waiver. With a limited exception not applicable here (regarding certain alien physicians), the statute does not create blanket waivers for entire fields of endeavor. *See Id.* at 217.

Counsel maintains that the petitioner's letters of reference are from "scientists, who are outstanding, internationally renowned, experts in their respective fields of endeavor," and that the director cannot disregard these letters without producing rebuttal letters from equally qualified scientists. Here, we return to the issue of the burden of proof. Counsel suggests that, by submitting the witness letters discussed above, the petitioner has shifted the burden of proof to the director, who must now refute a hypothetical presumption of eligibility. But, pursuant to *Brantigan* at 494, the burden of proof does not shift to the government.

The submission of favorable letters from witnesses selected by the petitioner does not compel the approval of a visa petition. Furthermore, the witnesses are the petitioner's current or former employers and supervisors. There is no evidence that anyone outside of the petitioner's circle of collaborators and employers consider her work to be especially important, and even the witness letters in the record provide few details to show that the petitioner's work is of particular significance within her specialty. There is no corroboration for counsel's characterization of these witnesses as "internationally renowned experts," and the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states that the director denied the petitioner her right to due process, because the director did not issue a request for evidence pursuant to 8 C.F.R. § 103.2(b)(8). The most expedient remedy for this defect would be to consider, on appeal, any new materials that the petitioner would otherwise have submitted in response to a request for evidence. Here, however, the petitioner submits no new evidence or statements on appeal, and counsel does not identify any further evidence already in existence that the petitioner would have submitted in response to a request for evidence. Instead, counsel's arguments on appeal revolve to a great extent on questionable hypothetical presumptions. We find that the director's failure to issue a request for evidence did not prejudice the matter to an extent that demands reversal of the director's decision.

While the prevention, treatment and cure of dangerous diseases is in the national interest, this does not mean that every alien who works toward that goal qualifies for a national interest waiver. In this instance, the waiver request is predicated almost entirely on the petitioner's involvement with the testing of a drug, Product R, which apparently was just entering preliminary trials as of the petition's filing date. Even if the petitioner were responsible for the discovery or formulation of Product R, the record does not show that Product R has gained any attention in the scientific community outside of its manufacturer's own self-serving press releases.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. Therefore, the petitioner has not met her burden of proof as set forth in section 291 of the Act and in *Matter of Brantigan*.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.